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THE NATURAL USE OF LAND.

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BY JOHN MARSHALL GEST, Esq.

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PART II.

We now resume the consideration of *Rylands v. Fletcher* with which the last paper closed.

In this case the defendant built a reservoir upon his premises in order to obtain a supply of water for his mill. In the course of the construction of the reservoir five old shafts running vertically downward were discovered. Three at least were timbered, and all were filled with soil such as surrounded them. The arbitrator who found the facts, reported that neither the defendants nor any of their employes knew or suspected that these shafts had originally been made for the purpose of mining the coal under the land on which they built their reservoir. It may be noted in passing, that it seems rather strange that the use once made of these shafts should not have been even suspected in a place like Lancashire, as men do not ordinarily dig deep holes in the ground and timber the sides for no purpose save to fill them up again. However, the case as stated, finds that the defendants, *personally*, had no knowledge or suspicion of the purpose for which these shafts had been sunk ; and further, what is certainly more reasonable,

that they did not know of, or suspect the connection between these shafts and a series of underground workings long since abandoned, which finally led into the plaintiff's colliery.

The reservoir itself was properly constructed by competent engineers and contractors, but it seems to be admitted (see opinion of Bramwell, B., 3 H. & C. 791, and Lord Cairns, L. R. 3 H. L. 338,) that they did not exercise, so far as they were concerned, reasonable care and caution in taking notice of the old shafts on the reservoir site. When the reservoir had been finished it was partially filled with water, but in a week's time one of the shafts in the bottom gave way and the water flowed out of the reservoir into the shafts and through the underground coal-working to the plaintiff's colliery which was flooded and consequently abandoned.

It being admitted that the defendant was personally entirely free from fault, the ordinary rule of law would be that the defendant owed no duty to the plaintiff beyond that of reasonable care, which would be a question for the jury; but the decision went upon the ground that a man dealing with a dangerous thing like a reservoir should be held to a stricter rule; that of insuring safety to his neighbor and thus the Court substituted an absolute duty instead of a fluctuating standard of prudence.

The Court of Exchequer Chamber, per Blackburn, J., gave judgment for the plaintiff on the following ground: "We think that the true rule of law is that the person who, for his own purpose, brings on his land and collects and keeps there anything likely to do mischief if it escapes must keep it at his peril, and if he does not do so is, *prima facie*, answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the defendant's fault; or, perhaps, that the escape was the consequence of *vis major*, or the act of God; but as nothing of this sort exists here it is unnecessary to inquire what excuse would be sufficient."

The duty of insuring safety is a heavy burden and bears hardly on the innocent. It is, therefore, not surprising that Fletcher *v.* Rylands has not been uniformly followed in

America, and even in England numerous exceptions have been made by the Courts. Thus, in *Nichols v. Marsland*, L. R. 10 Ex. 255, 2 Ex. D. 1, an extraordinarily violent rain storm broke down the defendant's embankment or dam and the resulting damage was held to be the act of God. And in *Carstairs v. Taylor*, L. R. 6 Ex. 217, a rat gnawed a hole in a water tank and the water damaged the plaintiff's goods. Kelly, C. B., said the accident was due to *vis major*.

Now, it may readily be said that the act of the defendant in Sanderson's case comes precisely within the terms of the rule in *Rylands v. Fletcher*. The water in Rylands' reservoir flowed there naturally; it was not "brought" there but merely allowed to accumulate. See 3 H. & C. 786, where the statement is made in argument. So little importance is attached to this fact that neither the reporters' statement or the judges' opinions mention it. So the coal company certainly did bring or accumulate on their land a thing, to wit: Acid and polluted mine water, which was likely to do mischief if it escaped, and, therefore, in the language of the rule, was at his peril, bound to keep the mischievous thing in bounds. Indeed, as the judgment of the Court said, that is so, whether the mischievous things were beasts, or water, or filth, or stench. And the illustration of the damage done by the filth in a neighbor's cess-pool, which poisons the water of a well, is very close to the case of the pollution of a water course by means of mine water.

Nevertheless, it would seem that the illustration used in the judgment of the Court assimilated too closely the case at bar to the case of an ordinary nuisance. Pollution of air or water is a nuisance and (so far as occurs to the writer) nothing else, and a nuisance is something well known to the law and governed by familiar rules. The damage in *Rylands v. Fletcher* was certainly not a nuisance and the rule laid down in it could not have been intended as a general rule for cases of nuisance, except so far as to indicate that the defendant, on account of the hazardous nature of his operations on his land, undertook and would be held to the obligation of an insurer, just as he who commits a nuisance is bound to indemnify his

neighbor against the consequences, it being no answer in either case to say that due diligence has been observed.

The duty enforced in *Rylands v. Fletcher* is a duty, not only to guard against doing damage through the exercise of *due* care and diligence, but, in certain cases, absolutely to prevent it by using *sufficient* care. But under what circumstances is this duty imposed? Almost anything which a man can bring on his land or accumulate there will do mischief if it escapes. If it be said that the rule is only intended to apply to cases where the thing brought on the land is of such a character that there is danger of its breaking loose and danger of its doing harm if it does so; then the question would seem to be rather a question of the degree of care or diligence to be employed in preventing its escape, and thus to be determined by the negligence of the defendant. Perhaps, it can only be said that where the act of the defendant is manifestly likely to cause damage, a stricter rule is expedient and the defendant will not be allowed to say he used reasonable care or due diligence; where, from the nature of the case, to quote the language of Pollock on Torts, the judgment of fact is consolidated into an unbending rule of law.

Now the difficulty which exists in each case when the question of negligence is submitted to a jury is certainly not less than in formulating such a principle. It amounts merely to saying that while negligence is the absence of care according to the circumstances, the omission or commission of an act which a prudent and reasonable man would or would not do: yet that the Court has the right to say on a given state of facts, that no prudent or reasonable man would have acted in such a way. Or, as a court cannot send a case to a jury on evidence disclosing to the judicial mind no proof of negligence; so a jury will not be allowed to find the defendant guiltless of negligence which the judicial mind thinks was proved.

The rule laid down by Blackburn, J., according to which the liability of the defendant grows out of his having or keeping a dangerous thing on his land, does not appear to have been entirely satisfactory to the Lord Chancellor (Cairns), for, although he quotes with apparent approval the judgment of

Blackburn, J., he substitutes an entirely different rule of his own, in which the criterion of liability is said to be the natural or non-natural user of his land by the defendant. Perhaps the Lord Chancellor noticed and attempted to amplify a passage in Blackburn, J.'s judgment, in which he speaks of the defendant "having brought something on his own property which was not naturally there," but the idea of natural *use of the land* is avowedly the Lord Chancellor's own. Indeed, it might almost seem as if he regarded the case as involving only a special rule respecting adjacent land owners, (see *Carstairs v. Taylor*, L. R. 6 Ex. 223, where one of the judges distinguished the case on that ground) but the other opinions in *Rylands v. Fletcher* certainly are of far wider scope.

The rule founded on the natural user of the land was thus explained by the Lord Chancellor (L. R. 3 H. L. 330): "The defendants might lawfully have used their close for any purpose for which it might, in the ordinary course of the employment of land be used, and, *if in what I might term the natural user of that land* there had been any accumulation of water either on the surface or underground, and if by the operation of the laws of nature that accumulation of water had passed off into the close occupied by the plaintiff, the plaintiff could not have complained that the result had taken place." And, again, "If the defendants, not stopping at the natural use of their close, had desired to use it for any purpose which *I may term a non-natural use*, for the purpose of introducing into the close that which in its natural condition was not in or upon it, for the purpose of introducing water either above or below ground in quantities, or in a manner not the result of any operations on or under the land, and if, in consequence of their doing so, or in consequence of any imperfection in the mode of their doing so the water came to escape and to pass off into the close of the plaintiff, then that which the defendants were doing they were doing at their peril."

This expression, "the natural user of the land," thus appears to be original with Lord Cairns. It was quoted with approval by Lord Blackburn in *Wilson v. Waddell*, L. R. 2 App. 95, and Brett and Cotton, L. JJ., in *Iron Co. v. Kenyon*, L. R.

11 Ch. Div. 783, and applied to mining, which was said to be a natural use or user of land.

Fletcher *v.* Rylands, being understood, or misunderstood, to establish the rule that, where the owner of land goes beyond its "natural user," or makes a "non-natural use" of it, he acts at his peril, and is liable for the resulting damage caused to his neighbor without regard to any question of his negligence, the Supreme Court of Pennsylvania, as was pointed out by the author of a very thoughtful note to Robb *v.* Carnegie, 31 A. L. R. N. S. p. 38, has gone, in Sanderson's case, to the full extent of holding that the converse of this rule applies, viz: that wherever the owner of land makes a "natural use" of his land, he is not, in the absence of negligence or malicious intent, liable for the damage which necessarily result therefrom.

The Supreme Court of Pennsylvania found as little difficulty in holding that mining was the "natural use" of mining land, as the English Court found in holding that a reservoir was non-natural. Not only was the coal naturally in place, and mining a "natural" use of the land (113 Pa. pp. 145-146), but the impurities of the water were not "artificial," but "natural" (pp. 145 and 155) and the discharge of the water was by way of "natural" channels (p. 147), from the drifts, out of which the water, by the mere force of gravity, "naturally" flowed. It could not well be said that the pump by which the shaft was kept free, was a "natural instrument," or the ditch from the mouth of the shaft to the brook; but it was evident to the Court that these agents were necessary to enable the "natural" force of gravity to act, and the owner to make the "natural" use of his land.

Said the Court, 113 Pa. 148: "As the water cannot be discharged by gravity alone, it must *necessarily*, as part of the process of mining, be lifted to the surface by artificial means, and thence be discharged through the ordinary natural channels for the draining of the country." The chain of "natural" causes being confessedly broken and other agents "necessarily" employed, why does not the language of Judge Black apply that the necessities of one man's business cannot be the standard of another's rights in a thing which belongs to both:

24 Pa. p. 298. The use of the pump is really the gist of the case.

With great deference to the opinions of the learned judges quoted, the writer is constrained to say that "the natural user of land" is to him an attractive but ambiguous form of words. It means everything or nothing. In one sense, every (lawful) use an owner makes of his land is natural; in another, no use can be natural which confessedly alters the condition of things established by nature. Natural, in one sense, is merely expedient or proper, or in accordance with what we term *human* nature, as where you speak of mining being a natural use of land, simply meaning that it is natural for the owner to get what he can out of it. Natural, in the other sense, is merely according to the laws of nature. If mining the coal as the end in view, be "natural," so blasting, pumping and draining, as the necessary means, may with equal justice be said to be natural also; but this employs the word in the first sense. The force of gravity, which makes the polluted water flow downwards is "natural" in the second sense.

Again, if a mine owner is allowed to develop his mines because he is making a "natural" use of his land, although that use "naturally" results in polluting the stream which the inferior owners use for agricultural and domestic purposes, what becomes of the "natural use" of his land by the agriculturist? It would be hard to find any more ancient, better recognized or "natural" use of land than that of pasturing cattle. Why is the miner's natural use of land to be preferred to the agriculturist's? And why is not the latter entitled to insist on his natural use as well as the other? But the decision in *Rylands v. Fletcher* really did not rest on any such criterion; it merely concerned the liability of one who brought (or suffered to accumulate) a manifestly dangerous thing within his control, and the Court held that such a one, when the dangerous thing escapes and does harm, must, as a matter of law, answer for the damage.

It may be remarked, moreover, that the decision was illustrated by the cases which hold, that the owner of cattle is bound at his peril to keep them from trespassing, and if they



escape and do damage, the owner cannot show, by way of defence, that he did all he reasonably could to keep them at home. (Blackburn, J., in the Exchequer Chamber, L. R. 1 Ex. 279.) Yet the keeping and pasturing of domestic cattle is most certainly a natural use of land; and this illustration is, from Lord Cairns' point of view, most unhappy. Again, in *Rylands v. Fletcher*, the defendant built his reservoir in order to avail himself of the water power for use in his mill: whether it be called a reservoir or a mill dam, does not seem to be important. It is a little hard to see why the owner of a "mill site," who constructs a dam to make the water power available, is not making as natural use of his land as the mine owner who bores a hole in it to get coal. For these reasons, it would seem that Lord Cairns was led to the phrase "natural user," in view of the fact, that in the case before him, the land owner brought on his land something which was not naturally there, and did not intend that the *kind of use* had any necessary connection with liability. Indeed, Lord Cairns' expressly quotes the opinion of Justice Blackburn, and approved the illustration he used as to escaping cattle, and Lord Cranworth followed Justice Blackburn's opinion as correctly stating the law.

With the correctness of the ruling in *Rylands v. Fletcher*, we are not now specially concerned. The decision at all events appears perfectly just on its facts, the difficulty (and it is a serious difficulty) is to bring the case within a general rule which shall at once be neither too narrow nor too broad. The following is submitted as an attempt only, and is probably no great improvement over the language of Blackburn, J.

He who voluntarily brings or suffers to remain under his control anything likely to do mischief, if it escape, must keep it under control at his peril. Thus stated, the rule has nothing to do with land or the method of its user. The defendant's liability would be the same whether he kept the dangerous thing on his land or in his pocket. If a man handles a gun he must not let it go off; if he makes a plaything of a snake, he must hold it fast; if he accumulates an enormous mass of water, he must keep it in bounds. The ordinary actions of

mankind are not fraught with danger to his fellows, and he is only bound to conduct himself with the ordinary prudence of a reasonable man: his extraordinary acts are subject to an extraordinary rule, mere prudence is not enough; if he might have in any possible way, prevented the evil, he is bound to do so and is liable for the consequences if he does not do so. The act of God, for which no one is responsible, is an expression which originated at a time when men had very different ideas than at this present. We mean by it, *vis major*, an unavoidable, overpowering force, rendering control impossible.

Our present purpose is merely to show that the case did not rule Sanderson's case at all; and, secondly, that the language of Lord Cairns as to natural user of land enabled the Supreme Court of Pennsylvania, not only to distinguish *Fletcher v. Rylands*, but also to adopt as law the converse of Lord Cairns' dictum, and say that no one, in the course of the natural user of his land, is liable for damages caused thereby.

In *Robb v. Carnegie*, 145 Pa. 324 (1891), the question of the natural use of land was considered. The plaintiff was a farmer, the defendant a neighbor, who erected coke ovens on his adjacent land. In an action of trespass on the case it was proved that the smoke and exhalations from the ovens killed the vegetation. The defendant urged, amongst other things, that he was engaged in a lawful business, had selected a judicious location for it and operated it without negligence or malice in a secluded place, where as few people were inconvenienced as possible, and consequently the injury was the natural and necessary result of the development by the owner of the resources of his land, as in Sanderson's case. A heavy verdict was given for the plaintiff and the Supreme Court reversed on the question of damages; while, on the merits, the court distinguished Sanderson's case as having no application. "The coal company," said Justice Williams, speaking of Sanderson's case, "was using its own land in the only manner practicable to it. The harm done thereby to others was the least in amount consistent with the natural and lawful use of its own. If this use was to be denied to the coal company, because some injury or inconvenience to others was unavoid-

able, then the result would be practical confiscation of the coal lands for the benefit of householders living on lower ground. But the defendants " (in *Robb v. Carnegie*), " are not developing the minerals in their land or cultivating its surface. They have erected coke ovens upon it and are engaged in the manufacture of coke. Their selection of this site, rather than some other, is due to its location and to their convenience, and has no relation to the character of the soil, or to the presence or absence of underlying minerals." And the question was left open " whether one who mines coal or petroleum or lead on his own land, has, by virtue of that fact alone, a right to manufacture or refine such product on the tract from which it was obtained under circumstances, which would prevent its manufacture or render him liable in damages, if he manufactured on some other tract."

Yet it would seem that a fair application of the principles of *Sanderson's* case would result in an affirmative answer to this question. It is quite as " natural " to burn the coal and convert it into coke as to mine it ; and as natural to pollute a neighbor's farm with the fumes of gas as to pollute his stream with the acid water.

Perhaps it would have been better for the Supreme Court in *Sanderson's* case to have adopted Justice Paxson's suggestion in his dissenting opinion, when the case first came before the Court that the rule of the English cases as to riparian rights was not adapted to the mining regions of Pennsylvania. Indeed, the case was interpreted by the lower Court in *Collins v. Chartier's Valley Gas Co.*, 131 Pa. p. 151-2, from this standpoint: " In the *Sanderson* case the property of the coal company could not be used without fouling the water ; the great public interests and the private rights of mining could not be sacrificed to preserve the inferior right and interest of the lower proprietor. The reason for the general rule failed, and the rule was not followed."

In the very recent case of *Hauck v. Pipe Line Co., Limited*, 153 Pa. p. 366 (1893), the defendant transported oil in their pipe. The oil escaped from their pipes, percolated through the ground and found its way into the plaintiff's

springs and land, destroyed the fish and caused heavy damage. The Court held, in an action for damages, that the question was not one depending upon the negligence of the defendant, but merely one of nuisance. The defendant argued that Sanderson's case applied, but the Court held that it did not, because the oil was brought from a distance, and the injury was not, in any sense, occasioned by the "natural and necessary development of the land" owned by the defendant; and the distinction was carefully drawn between a damage resulting on one hand from such "natural and necessary development," and on the other hand from "the character of some business not incident and necessary to the land or the minerals or other substances lying within it."

In the *Union Water Co. v. Enterprise Oil Co.*, 38 Pitts. Leg. Journal, 159 (1890), the Common Pleas of Beaver county applied *Sanderson v. Coal Company* to the case of an oil company, which, in pumping its oil well, brought to the surface a large quantity of salt water mingled with the oil. The salt water sinking to the bottom of the receiving tank by reason of its greater gravity was allowed to flow away, finally seeking its level in a stream, the water of which was rendered unfit for its ordinary use. The Court, following Sanderson's case, refused an injunction prayed for against the oil company.

The writer believes that, in Sanderson's case, substantial justice was reached in the decision. Whether the reasons are sound is another question, and it is frequently easier to reach a right conclusion than to give the right reason for it.

By way of suggestion, it may be submitted: First, the Supreme Court should have permitted it to be shown that the custom of the mining regions established an exception to the ordinary rule of law. There were many cases cited on the argument to this effect, some of which are to be found in 113 Pa. 141. A few others are: *Morton v. Solambo County*, 26 Cal. 527; *Stone v. Bumpus*, 46 Cal. 218; *Magor v. Chadwick*, 11 A. & E. 571; *Snow v. Parsons*, 28 Vt. 459, and *Prentice v. Geiger*, 74 N. Y. 341.

Custom is the life of law. It is founded on what the mass of the people instinctively recognize as just and what they

know to be advantageous on the whole to their own interests. If fairly proved, why may not the universal custom of the mining regions or the oil regions establish the law for those places, however, different that may be from the rules adapted to a purely agricultural country? The torrid climate of India requires the storing up of large quantities of water for use in dry seasons, so when the reservoir of the Zemindar of Carvatenagarum burst and injured the railway line, *Fletcher v. Rylands* was held not to apply, and one of the reasons given was because the reservoir was a public necessity maintained in accordance with the universal custom of the country: *L. R. 1 Ind. Ap. 364*.

It is, perhaps, worth while—though this review has already taken more space than at first intended—to reproduce on this point the argument made before the Supreme Court based upon the cases mentioned.

In *Carlyon v. Lovering*, 1 H. & N. 784, above cited, a custom to discharge into a stream the waste product of the mines in the Stannaries was sustained. The Court said: "We do not see that this has a tendency to destroy the plaintiff's land or exclude the plaintiff from the use of the land, except to a partial extent. We think that the custom alleged is sufficiently definite and is not unreasonable. It is possible more stuff from the mine may come down at one time than at another, but that does not show that the custom is bad. We think that it is to be confined in use to the *necessary* working of the mine."

In *Rogers v. Brenton*, 10 Q. B. 26, the Court recognized the validity of a custom to take up tin mines in the following language: "The mine is parcel of the soil, the ownership is in the owner of the soil, but it is a parcel which to discover and bring to the surface may ordinarily require capital, skill, enterprise and combination, which, while in the bowels of the earth, is wholly useless to the owner as well as to the public, and the bringing of which into the market is eminently for the benefit of the public. If, therefore, the owner of the soil cannot, or will not, do this for himself, he shall not be allowed to lock it up from the public, and, therefore, in such case . . .

any tinner, that is, any man employing himself in tin mining, may secure to himself the right to dig the mines under the land, rendering a certain portion of the produce to the owner of the soil." And the Court, though styling this custom "a strong invasion of the rights of ownership," said: "There can be no doubt that it is most reasonable, fulfilling every requisite of a good custom."

In California precisely similar reasoning has been adopted. In that State the public interests depended upon the development of the gold mines, which constituted a large portion of the natural resources of the country. The courts there have always recognized the fact that the mining customs, which originated from the exigencies of the case, were valid as prescribing the rules of mining in particular localities. They were necessary, because in no other way could mining be carried on successfully. They were proper and reasonable, because established by those who were most competent to decide the question. Any one who discovered a lode or vein of ore located it by posting a notice on his claim. That gave him a title against everybody else. In minor points every locality had its particular usage, and these were always sustained. In *Morton v. Salambo Co.*, 26 Cal. 527, it was held that where any local mining customs exist, controversies affecting a mining right must be solved and determined by the customs and usages of the bar or diggings embracing the claim to which such right is asserted or denied, whether such customs and usages are written or unwritten. In another case the local custom of the diggings required every man to work his claim two days in every ten, from May to November. Failure to do so worked a forfeiture of the claim: *Packer v. Heaton*, 9 Cal. 568; *Strang v. Ryan*, 46 Cal. 33; *St. John v. Kidd*, 26 Cal. 264. So, in Colorado, in the early settlement of the territory the location of mining claims was regulated by the local usages and customs of the district: *Sullivan v. Hense*, 2 Col. 424. These mining customs acquire validity from the acquiescence, of the people: *Harvey v. Ryan*, 42 Cal. 626. The miner's right comes from the mere appropriation of the claim, made in accordance with the mining rules

and customs of the vicinage: *Gore v. McBrayer*, 18 Cal. 582; *Colman v. Clements*, 23 Cal. 245. The law is the same in Nevada: *Oreamuno v. Uncle Sam Co.*, 1 Nev. 215; *Mallett v. Uncle Sam*, 1 Nev. 188.

This question has also been considered in the Supreme Court of the United States. Mr. Justice Field, in *Atchison v. Peterson*, 20 Wall, 507, stated the law very clearly on page 510: "By the custom which has obtained among miners in the Pacific States and Territories, where mining for the precious metals is had on public lands of the United States, the first appropriator of mines, whether in placers, veins, or lodes, or of water in the streams on such lands for mining purposes, is held to have a better right than others to work the mines or use the waters." "As respects the use of water for mining purposes, the doctrines of the common law, declaratory of the rights of riparian owners, were, at an early day, after the discovery of gold, found to be inapplicable, or applicable only in a very limited extent, to the necessities of miners, and inadequate to their protection." After stating the custom in the Pacific States as to appropriation of the streams for mining purposes, Mr. Justice Field says: "So the miners on the public lands throughout the Pacific States and Territories, by their customs, usages and regulations, everywhere recognized the inherent justice of this principle, and the principle itself was at an early period recognized by legislation and enforced by the courts in those States and Territories: *Irwin v. Phillips*, 5 Cal. 140."

In *Snow v. Parsons*, 28 Vt. 459, the reasonableness of the use of a stream by the upper riparian owner was held to be a question of fact, to determine which testimony, showing the uniform usage of the country, was admissible. The offer in that case was to show that it had been the universal and uniform custom and practice to discharge the spent bark of tanneries into the streams on which they were situated ever since the country was first settled, and that dam owners situated below on the streams had never, so far as witnesses knew, disputed the right to do so until now; that tanneries could not be conducted at any profit without that means of

disposing of their spent bark, and that the withholding such use of the stream from tanners would have excluded that branch of industry from the State; and that the same custom and practice had uniformly prevailed in all the States of New England. It was admitted by defendant that, prior to 1844, there was no tannery on this particular stream and this suit was brought about ten years afterwards. Judge Redfield said, the question "must be determined upon general principles applicable to the entire business of tanning, and the importance of discharging its waste materials in this mode and the probable inconvenience of those below. . . . It seems to me the uniform custom of the country for generations would be of some significance in determining its reasonableness. A uniform general custom upon this subject ought, upon general principles, to have a controlling force."

An analogous custom in booming logs is considered in *Saunders v. Clark*, 106 Mass. 331.

And in *Stone v. Bumpus*, 46 Cal. 218, a local custom was allowed to be shown by which the owner of a mining claim, comprising the bed of a cañon, was allowed to erect a dam across the bed of the cañon to enable him to work the same, even if other mining claims on the same cañon of subsequent location became thereby flooded.

Custom, in this sense, is merely the tacit recognition of the general advantage or necessity of certain things usually done, and which the common sense of the neighborhood recognizes as proper and right. It is probably some such thought which underlies the expression "the natural user of the land," because whatever is usual and customary; that which "everybody does" becomes, in a sense, natural. Plowing is not a "natural" use of land in that the natural character of the land is destroyed, but it *is* natural in that everybody knows that if agriculture is to be carried on at all, that is the way to do. Yet the plowing of land and the cutting down of trees to permit plowing to be done may, and often does, result in serious changes in the character of the streams. The Zemindar's reservoir was "natural" in India because authorized by custom, and, as was said "the only possible mode of natural use."



But in England the conditions of life were so different that Rylands' reservoir was merely an unusual structure threatening extraordinary danger.

In the second place, it was urged with some confidence, before the Supreme Court, that Sanderson's case involved at most a question of nuisance and was to be governed by the rules applicable to that branch of the law. The language of Lord Cransworth was quoted from *St. Helen's Smelting Company v. Tipping*, 11 H. L. 642: "I well remember trying a case in the county of Durham, where there was an action for injury arising from smoke in the town of Shields. It was proved incontestably that smoke did come and, in some degree, interfere with a certain person, but I said: 'You must not look at it with a view to the question whether abstractedly that quantity of smoke was a nuisance, but whether it was a nuisance to a person living in the town of Shields.'"

And so, in Pennsylvania, the above language was quoted with approval in *Rhodes v. Dunbar*, 57 Pa. 287; and again in *Huckenstine's Appeal*, 70 Pa. 102. In the latter case the Court said: "The properties of the plaintiff and defendant lie adjoining each other on the hillside overlooking the city, whose every-day cloud of smoke from thousands of chimneys and stacks hangs like a pall over it, obscuring it from sight. This single word describes the characteristics of this city; its kind of fuel; its business the habits of its people and the industries, which give it prosperity and wealth. The people who live in such a city or within its sphere of influence do so of choice, and they voluntarily subject themselves to its peculiarities and its discomforts for the greater benefit they think they derive from their residence or their business there."

If, then, a nuisance is a question, not only of the thing done, but of the place where and circumstances under which it is done; if persons in a populous manufacturing town have to put up with poisonous vapors, why should not persons in Scranton have to make the best of it when the surface streams are polluted by the drainage from mines, from the like of which the whole neighborhood has derived its wealth and prosperity?